



Linda S. Adams  
Secretary for  
Environmental Protection

# California Regional Water Quality Control Board

## San Diego Region

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9174 Sky Park Court, Suite 100, San Diego, California 92123-4353  
(858) 467-2952 • Fax (858) 571-6972  
<http://www.waterboards.ca.gov/sandiego>

August 11, 2008

Ms. Lisa Hildabrand  
City of Carlsbad  
1200 Carlsbad Village Drive  
Carlsbad, CA 92008

CERTIFIED MAIL  
7007 1490 0003 8753 5452

In reply refer to:  
CWU:R920080099:bjames

CIWQS Place ID: 224166;  
629552

**RE: NOTICE OF VIOLATION NO. R9-2008-0099**

**Subject Sites:**

1. Faraday Avenue Extension and Carlsbad Oaks North Business Park
2. Agua Hedionda Channel Dredging Project

Dear Ms. Hildabrand,

Enclosed is **Notice of Violation (NOV) No. R9-2008-0099** for the subject sites in the City of Carlsbad, San Diego County, CA. The Faraday Avenue Extension and Carlsbad Oaks North Business Park project was issued Clean Water Act Section 401 Certification No. 02C-093 (Certification) on July 19, 2004. The Agua Hedionda Channel Dredging Project was issued Clean Water Act Section 401 Certification No. 06C-007 (Certification) on March 2, 2006. Violations specified in the NOV were identified during a site inspection on July 2, 2008 and during review of the California Regional Water Quality Control Board, San Diego Region files for the projects. Failure to comply with the directives/conditions of the certification are serious and subject you to potential liability that accrues for each day of violation. Therefore, I urge you to take immediate steps to achieve compliance.

Questions pertaining to the enclosed Notice of Violation should be directed to Benjamin James at 858-467-2968 or [bjames@waterboards.ca.gov](mailto:bjames@waterboards.ca.gov).

David Barker  
Supervising Engineer

Attachments: Notice of Violation R9-2008-0099; July 2, 2008 Inspection Report

RF

Ms. Hildabrand

- 2 -

August 11, 2008

cc by e-mail:

Kari Coler, U.S. Army Corps of Engineers, [Kari.Coler@usace.army.mil](mailto:Kari.Coler@usace.army.mil)

Tamara Spear, California Department of Fish and Game, [tspear@dfg.ca.gov](mailto:tspear@dfg.ca.gov)

Glenn Prui, City of Carlsbad, [gprui@ci.carlsbad.ca.us](mailto:gprui@ci.carlsbad.ca.us)

Grant Clavier, City of Carlsbad, [gclav@ci.carlsbad.ca.us](mailto:gclav@ci.carlsbad.ca.us)

CIWQS: NOV – 350121; Place No. – 224166, 629552; Violations – 778594, 778603;  
401 Certification – 214323, 298102







**5. FAILURE TO CONSTRUCT THE COMPENSATORY MITIGATION AS REQUIRED BY THE CERTIFICATION AND CONFORM TO THE MITIGATION PLAN**

➤ **Pursuant to Certification Condition D.2:**

- The applicants shall mitigate for permanent impacts to 2.7 acres of jurisdictional Waters of the U.S. at the following ratios, in accordance with the May 2004 *Wetland Mitigation Plan Faraday Avenue Extension, South Agua Hedionda Sewer Interceptor, and Carlsbad Oaks North Business Park* (prepared by Merkel & Associates).

Jurisdictional Type	Impacted Acreage	Creation Mitigation Ratio	Creation Acreage	Enhancement Mitigation Ratio	Enhancement Mitigation Acreage
Southern Willow Scrub	1.4	1:1	1.9	4:1	6.0
Freshwater Marsh	0.4	1:1	0.4		
Cismontane Alkali Marsh	0.4	3:1	1.2		
Disturbed Wetland	0.1	--	--		
Non-wetland Waters of the U.S.	0.4	--	--		
<b>Total</b>	<b>2.7</b>		<b>3.5</b>		<b>6.0</b>

**Observation:** The *Mitigation Compliance Report for the Carlsbad Oaks North On-site Mitigation Area (No. 200200641-JMP)* prepared by HELIX Environmental Planners, Inc., was received by the Regional Board on November 9, 2006 and states that a "total of 3.06 acres of wetland habitat was created, consisting of 1.43 acres of southern willow scrub, 1.02 acres of cismontane alkali marsh, and 0.61 acre of freshwater marsh." This report illustrates the applicant's failure to construct the required total compensatory mitigation acreage, and the required specific habitat acreage.

**6. FAILURE TO CONSTRUCT TIMELY HABITAT MITIGATION**

➤ **Pursuant to Certification Condition D.5**

- The construction of proposed mitigation shall be completed within the same calendar year as impacts occur, or at least no later than 9 months following the close of the calendar year in which impacts first occur (e.g., if impacts occur in June 2004, construction of mitigation for all impacts must be completed no later than September 2005).

**Observation:** Due to a lack of reporting, it is unknown when the initial impacts occurred. Assuming a start date of late 2004 or early 2005, the mitigation site should have been completed by September 2005. The September 2005 deadline is based on the example provided in the certification, the fact that the certification was issued July 19, 2004, and that





commercial, industrial, institutional, and transportation development, and any other infrastructure development that would not maintain or enhance the wetland functions and values of the site. Other infrastructure development to be prohibited includes, but is not limited to, additional utility lines, paved maintenance roads, and areas of maintained landscaping for recreation. The City of Carlsbad shall submit proof of a completed preservation mechanism within one year of the submittal of the draft preservation mechanism.

**Observation:** Failure to submit a final mitigation plan has resulted in a violation of Condition C.7 of the certification which requires a draft preservation mechanism for the mitigation area be submitted to the Regional Board within 90 days of acceptance of the final mitigation plan and proof of a completed mechanism within one year of the submittal of the draft plan.

### 3. FAILURE TO CONSTRUCT TIMELY HABITAT MITIGATION

#### ➤ Pursuant to Certification Condition C.9

- The construction of proposed mitigation shall be completed within the same calendar year as impacts occur, or at least no later than 9 months following the close of the calendar year in which impacts first occur (e.g., if impacts occur in June 2006, construction of mitigation for all impacts must be completed no later than September 2007).

#### ➤ Pursuant to Certification Condition C.8

- The City of Carlsbad shall submit a report (including topography maps and planting locations) to the SDRWQCB within 90 days of completion of mitigation site preparation and planting, describing as-built status of the mitigation project. If the site grading and planting are not completed within six weeks of each other, separate reports will be submitted describing those specific as-built conditions.

#### ➤ Pursuant to Certification Condition C.12

- Mitigation monitoring reports shall be submitted annually until mitigation has been deemed successful. Monitoring reports shall be submitted no later than 30 days following the end of the monitoring period. Monitoring reports shall include, but not be limited to, the following:
  - a. Names, qualifications, and affiliations of the persons contributing to the report;
  - b. Tables presenting the raw data collected in the field as well as analyses of the physical and biological data;
  - c. Qualitative and quantitative comparisons of current mitigation conditions with pre-construction conditions and previous mitigation monitoring results;
  - d. Photodocumentation from established reference points;
  - e. Survey report documenting boundaries of mitigation area; and

- f. Other items specified in the draft and final Wetland and Riparian Mitigation and Monitoring Plan.

**Observation:** The project was initiated on March 6, 2006 and was completed on March 25, 2006. No evidence of the proposed compensatory mitigation work being conducted was observed during the site inspection conducted by the Regional Board on July 2, 2008. The lack of the compensatory mitigation work being conducted is supported by the violations in the lack of reporting of the 90 day completion of mitigation site preparation report per Condition C.8 of the certification and the annual mitigation and monitoring reports per Condition C.12 of the certification. Failure to construct the mitigation area has also resulted in a violation of Condition D.4 of the certification, which requires the City of Carlsbad to conduct a five-year Bioassessment Monitoring Program and report the results concurrently with the habitat mitigation and monitoring plan required in Condition C.12 of the certification.

#### 4. FAILURE TO DEVELOP A FIVE-YEAR BIOASSESSMENT MONITORING PROGRAM

➤ **Pursuant to Certification Condition D.1**

- The City of Carlsbad shall develop and implement a five-year Bioassessment Monitoring program to evaluate changes in the benthic macroinvertebrate community in Agua Hedionda Creek resulting from impacts of the dredging project and future planned flood control projects.

➤ **Pursuant to Certification Condition D.4**

- The five-year Bioassessment Monitoring Program will begin concurrently with the habitat mitigation program pursuant to Section C. of this certification. The bioassessment data and analysis shall be submitted as part of the required habitat mitigation monitoring reports pursuant to Condition C.12 of this certification.

**Observation:** The five-year Bioassessment Monitoring Program has not been received by the Regional Board. The Regional Board has also not received any results of the five-year Bioassessment Monitoring Program either. The monitoring program was required to begin concurrently with the habitat mitigation monitoring and the results are to be reported per Condition D.4 of the certification with the annual mitigation monitoring reports per Condition C.12 of the certification.

Questions pertaining to the issuance of this Notice of Violation should be directed to Benjamin James at 858-467-2968 or [bjames@waterboards.ca.gov](mailto:bjames@waterboards.ca.gov). Written correspondence pertaining to this Notice of Violation should be directed to the following address:

David Barker  
Attn: Benjamin James  
California Regional Water Quality Control Board, San Diego Region  
9174 Sky Park Court, Suite 100, San Diego, CA 92123-4340



David Barker  
Supervising Engineer

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN DIEGO REGION

FACILITY INSPECTION REPORT

DATE: July 2, 2008, July 11, 2008, & July 15, 2008

FACILITY: City of Carlsbad 401 Certification Compliance Review

1. Faraday Avenue Extension and Carlsbad Oaks North Business Park (401 Cert 02C-093)
2. Agua Hedionda Channel Dredging Project (401 Cert 06C-007)
3. North Agua Hedionda Interceptor – Western Segment (401 Cert 04C-089)

PLACE IDs: 224166 (Faraday Avenue Extension and Carlsbad Oaks North Business Park)  
629552 (Agua Hedionda Channel Dredging Project)  
243797 (North Agua Hedionda Interceptor – Western Segment)

REGULATORY MEASURES: 214323 (Faraday Avenue Extension and Carlsbad Oaks North Business Park)  
298102 (Agua Hedionda Channel Dredging Project)  
214364 (North Agua Hedionda Interceptor – Western Segment)

APPLICABLE WATER QUALITY LICENSING REQUIREMENTS

- MS4 URBAN RUNOFF REQUIREMENTS NPDES NOS. CAS0108758, CAS0108740 or CAS0108766
- GENERAL PERMIT ORDER NO. 99-08-DWQ, NPDES NO. CAS000002 – CONSTRUCTION
- GENERAL PERMIT ORDER NO. 99-06-DWQ, NPDES NO. CAS000003 - CALTRANS
- GENERAL OR INDIVIDUAL WASTE DISCHARGE REQUIREMENTS
- GENERAL OR INDIVIDUAL WAIVER OF WASTE DISCHARGE REQUIREMENTS
- SECTION 401 WATER QUALITY CERTIFICATION
- CWC SECTION 13264

INSPECTION TYPE

B1 X "B" type compliance--A routine nonsampling inspection. (EPA Type C)

INSPECTION FINDINGS

Y Were violations noted during this inspection? (Yes/No/Pending Sample Results)

N Were samples taken? (N=no) If YES then, G= grab or C= Composite and attach a copy of the sample results/chain of custody form

STAFF INSPECTOR(S)

Benjamin James

Name

Signature

Date

Lowell Thomson

Name

Signature

Date

Bree Bourassa

Name

Signature

Date



**Condition C.2**

The City of Carlsbad, shall install 10 storm drain inlet filters (Krista[sic] Flo-Guard Plus or an equivalent filter) on Faraday Avenue and El Fuerte Road, as depicted in the submitted Drainage Exhibit (prepared by O'Day, June 2004) per the manufacturers specifications<sup>1</sup>.

Status: Present conditions are not the same as what was proposed and certified in terms of the number of drain inlets present on El Fuerte Street and the storm drain inlets proposed to contain drain inlet filters.

Inspection Results: On 7/2/2008 the Regional Board inspected the completed Faraday Avenue and El Fuerte Street roadways that are open for public traffic. It appears that the post-construction BMPs for these roadways were not maintained in an effective manner.

All of the proposed inlets on Faraday Avenue that were required to have inlet filters had baskets and booms present. However, in most instances, the baskets were full of trash, debris, and /or sediment that have overloaded the booms, and thus rendered them ineffective. In one case, a boom appeared to be broken (see picture on the next page).

The number of storm drains proposed (7) in the Drainage Exhibit for El Fuerte Street was not the same number as actually constructed on the roadway (8). On the west side of the street there is 1 extra drain inlet. Of the 7 proposed inlets, 4 were required to have inlet filters (consisting of a basket and a boom). Only 2 baskets and 1 boom were observed along the roadway. The 2 drain inlets at the intersection with Faraday Avenue had baskets present, and only the inlet on the east side of the roadway had a boom. The 2 other drain inlets that were required to have inlet filters were missing baskets and booms. The rest of the drain inlets on El Fuerte Street, including the extra inlet did not contain a basket or a boom.

No request for an amendment to the certification has been received by the Regional Board.

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<sup>1</sup> Note: 12 storm drain inlet filters are proposed on the Drainage Exhibit, not 10 as required by the 401 Water Quality Certification.







**Condition C.9**

As each individual lot is being developed, and upon final approval by the City of Carlsbad or permanent BMPs selected for that individual pad, the City of Carlsbad will provide the Regional Board with a summary report of the treatment BMPs selected to be implemented for each lot, including but not limited to:

- a. The anticipated pollutants of concern for the proposed end use of the pad.
- b. The types of permanent water quality BMPs to be implemented on site.
- c. Design specifications and sizing calculations for the permanent BMPs.
- d. A diagram depicting the location of the permanent water quality BMPs.
- e. A description of the maintenance requirements for each BMP, the responsible party for the maintenance, and the funding mechanism to ensure maintenance of the BMPs in perpetuity,

Status: No summary reports have been received by the Regional Board.

Inspection Results: 4 Notices of Intent for construction have been submitted to the State Board for enrollment in the Construction NPDES permit for properties within Carlsbad Oaks North Business Park property.

**Condition D.2**

The applicants shall mitigate for permanent impacts to 2.7 acres of jurisdictional Waters of the U.S. at the following ratios, in accordance with the May 2004 *Wetland Mitigation Plan Faraday Avenue Extension, South Agua Hedionda Sewer Interceptor, and Carlsbad Oaks North Business Park* (prepared by Merkel & Associates).

Jurisdictional Type	Impacted Acreage	Creation Mitigation Ratio	Creation Acreage	Enhancement Mitigation Ratio	Enhancement Mitigation Acreage
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Freshwater Marsh	0.4	1:1	0.4		
Cismontane Alkali Marsh	0.4	3:1	1.2		
Disturbed Wetland	0.1	--	--		
Non-wetland Waters of the U.S.	0.4				
<b>Total</b>	<b>2.7</b>		<b>3.5</b>		<b>6.0</b>

Status: The *Mitigation Compliance Report for the Carlsbad Oaks North On-site Mitigation Area (No. 200200641-JMP)* received by the Regional Board on 11/9/06 states that a "total of 3.06 acres of wetland habitat was created, consisting of 1.43 acres of southern willow scrub, 1.02 acres of cismontane alkali marsh, and 0.61 acre of freshwater marsh." This report illustrates failure to comply with Condition D.2 of the 401 Certification.



### Condition D.8

Habitat mitigation monitoring reports shall be submitted semi-annually during the first year following installation, and annually until mitigation has been deemed successful. Monitoring reports shall be submitted no later than 30 days following the end of the monitoring period. Monitoring reports shall include, but not be limited to, the following:

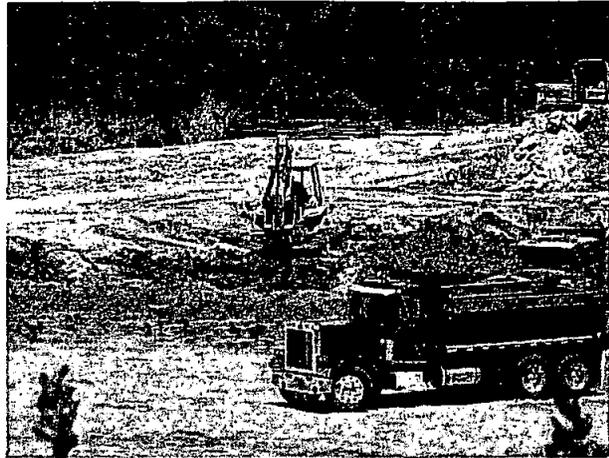
- a) Names, qualifications, and affiliations of the persons contributing to the report;
- b) Tables presenting the raw data collected in the field as well as analyses of the physical and biological data;
- c) Qualitative and quantitative comparisons of current mitigation conditions with pre-construction conditions and previous mitigation monitoring results;
- d) Photo documentation from established reference points;
- e) Survey report documenting boundaries of mitigation area; and
- f) Other items specified in the draft and final Wetland and Riparian Mitigation and Monitoring Plan.

Status: No semi-annual, or annual reports received. Based on the *Mitigation Compliance Report for the Carlsbad Oaks North On-site Mitigation Area (No. 200200641-JMP)* received by the Regional Board on 11/9/06, the first semi-annual report was due no later than May 2007.

### C. Mitigation Inspection Results:

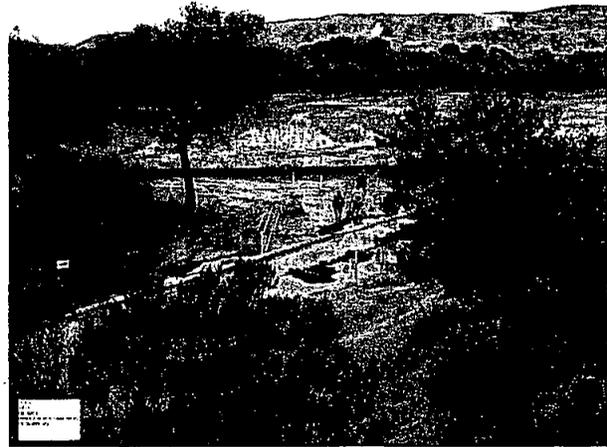
On 7/2/08 the Regional Board inspected the creation area of the mitigation site, located west of South Melrose Drive, south of Faraday Avenue extension. Visual observations indicate that the completed mitigation site, inside the orange fencing, is not the required 3.5 acres. This is further supported by the only the mitigation related report received, the *Mitigation Compliance Report for the Carlsbad Oaks North On-site Mitigation Area (No. 200200641-JMP)*, which states 3.06 acres of wetlands were created. Some work has been conducted, as plantings were observed in the southern portion of the site.

Also, heavy machinery and work was observed being conducted in the mitigation area. Due to a lack of reporting, it is unknown if this work is related to the sewage spills in April 2007. Also as a result of the lack of reporting, it is unknown if the required enhancement component of mitigation has been completed. It appears that the required mitigation is not complete, and was not completed in the time required. (See the photographs on the next page.)



Picture on left (IMG\_0485.JPG): Taken from the parking lot of the building at Apsen Way and S. Melrose Dr., overlooking mitigation area. Notice work being conducted in the mitigation area.

Picture on right (IMG\_0486.JPG): Closer view of work being done in the mitigation area.



Picture on left (Photo 159. 4/3/07, Frank Durazo): Reference the lone tall tree in the background of this picture, is the same tree in the foreground of the above picture and the picture to the right.<sup>2</sup>

Picture on right (Photo 42. 04/07/2007 16:45, Cirilo Mariscal, Overview of the spilled sewage into the containment area): Taken from relatively the same vantage point as the above left picture.<sup>3</sup>

<sup>2</sup> The picture and citation are taken from the City of Vista Investigation Order Report. The picture illustrates the size of the mitigation area at the time of the sewage spill.

<sup>3</sup> Same as above.













- a. Names, qualifications, and affiliations of the persons contributing to the report;
- b. Tables presenting the raw data collected in the field as well as analyses of the physical and biological data;
- c. Qualitative and quantitative comparisons of current mitigation conditions with pre-construction conditions and previous mitigation monitoring results;
- d. Photo-documentation from established reference points;
- e. Survey report documenting boundaries of mitigation area; and
- f. Other items specified in the draft and final Wetland and Riparian Mitigation and Monitoring Plan

Status: No reports have been received by the Regional Board.

C. Mitigation Inspection Results:

On 7/2/2008, 7/11/2008, and 7/15/2008 the Regional Board inspected the proposed mitigation area in the *Draft Conceptual Habitat Revegetation Plan North Agua Hedionda Interceptor Western Segment Sewer Maintenance, Access Road & Shoreline Protection Project*. The property was fenced off, with one opening created near a trail head on Park Drive on the western side of the property, with a trash can on the road side of the fence. Visual observations were inconclusive to determine whether mitigation activities were conducted. Due to the lack of reporting and clear visual appearance of mitigation activities, it is assumed the mitigation requirements of the 401 Certification have not been conducted.



Picture on left (IMG\_0503.JPG): Proposed wetlands 0.6 acre creation area.

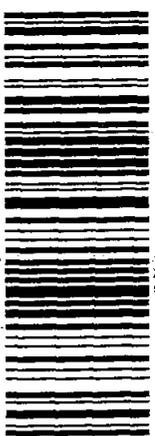
Picture on right (IMG\_0504.JPG): Area to the east of the proposed creation area.



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PS Form 3800, August 2006

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